

SURVEY OF ILLINOIS LAW: FAMILY LAW

REBECCA J. O'NEILL*

- I. Introduction
- II. Statutory Changes
 - A. Civil Unions 750 ILCS 75/1 *et.seq*
 - B. Same Sex Marriages, 750 ILCS 80/10, Equal Access to Marriage
 - C. Disposition of Property 750 ILCS 5/503
 - D. Securing Maintenance with Life Insurance 750 ILCS 5/504
 - E. Child Support; Contempt; Penalties 750 ILCS 5/505
 - F. Jurisdiction; Commencement of Custody Proceeding 750 ILCS 5/601
 - G. Joint Custody—Right of First Refusal 750 ILCS 5/602.3
 - H. Temporary Orders 750 ILCS 5/603
 - I. Professional Personnel 750 ILCS 5/604
 - J. Hearings 750 ILCS 5/606
 - K. Visitation 750 ILCS 5/607
 - L. Enforcement of Visitation Orders 750 ILCS 5/607.1
 - M. Modification 750 ILCS 5/610
- III. Case Law
 - A. Education Expenses 750 ILCS 5/513(a)(2)
 - B. Disgorgement of Attorneys Fees 501(c-1), Guardian Ad Litem Fees and Contempt
 - C. Guardian Ad Litem's Role and Conflicts with Serving as Mediator
 - D. Child Representative's Absolute Immunity 750 ILCS 5/506(a)(3)
 - E. Contempt for Non-Payment of Child Support
 - F. Removal
 - G. Child Support when Joint Custody Ordered—750 ILCS 505(a)(2)
 - H. Parentage Judgment Establishing Father-Child Relationship is Not a "Custody Judgment" under the Parentage Act
 - I. Standard to be Applied when a Biological Father Seeks Visitation Privileges after a Determination of Parentage
 - J. Division of Marital Property—750 ILCS 5/503(d)

* Clinical Professor, Southern Illinois University School of Law, Carbondale. J. D. 1988, B. A. 1985, Southern Illinois University. Rebecca O'Neill has taught in the Civil Practice Legal Clinic for twenty-three years while representing clients age 60 and older. Rebecca taught Family Law for ten years. She has also served as Professor for the Administrative Office of Illinois Courts in the areas of Family Law and Domestic Violence. Rebecca gives special thanks to her research assistants Benjamin Martin and Adam Bragee for their assistance in the research for this article. She also gives special thanks to her editor, J. David Sanders, for his patience and assistance.

- K. Property Valuation in Bifurcated Cases—*In re Marriage of Mathis*
 - L. Pension Survivor Benefits
 - M. Lump-Sum Worker's Compensation Settlement Was Income for Child Support Purposes
 - N. Withdrawal of Savings not Considered Income—*In re Marriage of McGrath*
 - O. Attorney's Fees 750 ILCS 5/508(a) and Rehabilitative Maintenance v. Permanent Maintenance
 - P. Attorney's Fees in Indirect Civil Contempt Case Even When Attorney Did not Bill Client
 - Q. Vacating Marriage Dissolution Judgment Where Marital Settlement Agreement was Unconscionable and Based upon Fraud Section 2-1401
 - R. Guardianship—Subject Matter Jurisdiction
 - S. Equitable Adoption—*DeHart v. DeHart*
- IV. Conclusion

I. INTRODUCTION

This Family Law Survey covers cases decided between July of 2011 through December of 2013 that apply or interpret the Illinois Marriage and Dissolution of Marriage Act (IMDMA). The article briefly touches upon guardianships and equitable adoption. Next, the article discusses revisions to the IMDMA during this time period. Finally, the article discusses the statutory changes to the IMDMA authorizing same sex marriages including provisions becoming effective after the time frame covered by this article. The purpose of this article is to summarize the cases, which give the most guidance in how the statutes are to be applied rather than to give a complete historical report on all of the opinions that were published during this time frame.

II. STATUTORY CHANGES

A. Civil Unions 750 ILCS 75/1 *et seq.*

The Illinois Religious Freedom Protection and Civil Union Act¹ went into effect on June 1, 2011.² This statute authorizes civil unions between opposite-sex couples as well as same-sex couples.³ The Act provides parties to a civil union, “the same legal obligations, responsibilities,

1. 750 ILL. COMP. STAT. 75/10 *et seq.* (2013).

2. 2010 Ill. Legis. Serv. P. A. 96-1513 (S. B. 1716) (West 2014).

3. 750 ILL. COMP. STAT. 75/10.

Protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law.”⁴

The following civil unions are prohibited:

- (1) a civil union entered into prior to both parties attaining 18 years of age;
- (2) a civil union entered into prior to the dissolution of marriage or civil union or similar legal relationship of one of the parties;
- (3) a civil union between ancestors and a descendent or between siblings, whether the relationship is by the half blood or the whole blood or by adoption;
- (4) a civil union between an aunt or uncle and a niece or nephew, whether the relationship is by the half or the whole blood or by adoption;
- (5) a civil union between first cousins.⁵

The Act sets forth the application, license and certification procedures at sections 30-40.⁶ Persons desiring to enter a civil union must complete an application.⁷ Once the application is completed and signed by both parties, the fees are paid, and both parties appear before the county clerk, the county clerk issues the license.⁸ A license becomes effective in the county where it was issued one day after the date of issuance and expires in sixty days.⁹ The certificate must be completed and returned to the county clerk within ten days of the civil union.¹⁰ If an applicant for a civil union license resides in another state and intends to continue to reside in another state, the county clerk is required to satisfy himself that the person is not prohibited from entering into a civil union or substantially similar relationship by the laws of the jurisdiction where the person resides. This can be done by affidavits or otherwise.¹¹ The persons who can certify a civil union are expressed in section 40.¹²

4. 750 ILL. COMP. STAT. 75/20 (2013).

5. 750 ILL. COMP. STAT. 75/25 (2013).

6. 750 ILL. COMP. STAT. 75/30-40 (2013).

7. 750 ILL. COMP. STAT. 75/30(b).

8. 750 ILL. COMP. STAT. 75/30(c).

9. 750 ILL. COMP. STAT. 75/30(d).

10. 750 ILL. COMP. STAT. 75/30(e).

11. 750 ILL. COMP. STAT. 75/35(a) (2013).

12. 750 ILL. COMP. STAT. 75/40 (2013).

Section 45 of this Act sets forth the procedures for dissolution or invalidity actions for civil unions and references the provisions of the IMDMA. This Act provides that persons who enter into civil unions in Illinois submit themselves to the jurisdiction of Illinois for any actions relating to the civil union, even if one or both of the parties no longer reside in Illinois.¹³ The Civil Practice Law applies to all proceedings under this Act.¹⁴ Venue for proceedings is proper in the county where either the petitioner or respondent resides or where the parties' certification of civil union was issued.¹⁵

Section 60 of the Act provides for reciprocity in the following manner:

A marriage between persons of the same sex, a civil union, or a substantially similar legal relationship other than a common law marriage, legally entered into in another jurisdiction, shall be recognized in Illinois as a civil union.¹⁶

B. Same Sex Marriages, 750 ILCS 80/10, Equal Access to Marriage

Effective June 1, 2014, the Religious Freedom and Marriage Fairness Act was amended to recognize same sex marriages.¹⁷ Section 10 of the Act now provides:

Equal access to marriage.

(a) All laws of this State applicable to marriage, whether they derive from statute, administrative or court rule, policy, common law, or any other source of civil or criminal law, shall apply equally to marriages of same-sex and different-sex couples and their children.

(b) Parties to a marriage and their children, regardless of whether the marriage consists of a same-sex or different-sex couple, shall have all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law, or any other source of civil or criminal law.

(c) Parties to a marriage shall be included in any definition or use of terms such as "spouse", "family", "immediate family", "dependent", "next of kin", "wife", "husband", "bride", "groom", "wedlock", and other terms

13. 750 ILL. COMP. STAT. 75/45 (2013).

14. 750 ILL. COMP. STAT. 75/50 (2013).

15. 750 ILL. COMP. STAT. 75/55 (2013).

16. 750 ILL. COMP. STAT. 75/60 (2013).

17. 2013 Ill. Legis. Service P.A. 98-597, (effective June 1, 2014) (S.B. 0010) (West 2014).

that refer to or denote the spousal relationship, as those terms are used throughout the law, regardless of whether the parties to a marriage are of the same sex or different sexes.

(d) To the extent the law of this State adopts, refers to, or relies upon provisions of federal law as applicable to this State, parties to a marriage of the same sex and their children shall be treated under the law of this State as if federal law recognizes the marriages of same-sex couples in the same manner as the law of this State.¹⁸

This act also amended section 209 of the IMDMA by substituting the words “a man and woman” with the words “2 persons.”¹⁹

The amendments make it clear that religious denominations, Indian Nations, Tribes or Groups are not required to solemnize marriages.²⁰ Nor are these entities required to provide facilities for solemnization of marriages if the solemnization is in violation of its religious beliefs.²¹

Persons who are married or in a civil union are prohibited from getting married prior to a divorce unless the parties to the marriage are the same as the parties to the civil union and are seeking to convert their civil union to a marriage.²² Persons are prohibited from marrying siblings²³ and nieces and nephews.²⁴

Same-sex couples who enter into a marriage in Illinois consent to the jurisdiction of the courts in Illinois for any actions relating to the marriage.²⁵ Courts shall enter dissolutions of marriage if grounds for dissolution of marriage are met under the IMDMA.²⁶

Illinois recognizes marriages and civil unions entered into in other states, except common law marriages and marriages that are prohibited under section 216 of the Act.²⁷

Parties to a civil union may apply for and receive a marriage license as well as have the marriage solemnized and registered under section 209 of the IMDMA. The fee for the application for a marriage license shall be waived.²⁸ Until June 1, 2015, parties to a civil union may have their civil union legally designated as a marriage deemed effective on the date of the

18. *Id.* 750 ILL. COMP. STAT. 80/10 (West 2014).

19. 750 ILL. COMP. STAT. 5/201 (West 2014).

20. 2013 Ill. Legis. Service P.A. 98-597, (effective June 1, 2014) (S.B. 0010) (amending, 750 ILL. COMP. STAT. 5/209(a-5)).

21. *Id.* (amending, 750 ILL. COMP. STAT. 5/209(a-10)).

22. *Id.* (amending, 750 ILL. COMP. STAT. 5/212(a)(1)).

23. *Id.* (amending, 750 ILL. COMP. STAT. 5/212(2)).

24. *Id.* (amending, 750 ILL. COMP. STAT. 5/212(3)).

25. *Id.* (amending, 750 ILL. COMP. STAT. 5/220).

26. *Id.*

27. *Id.* (amending, 750 ILL. COMP. STAT. 75/60).

28. *Id.* (amending, 750 ILL. COMP. STAT. 75/65).

solemnization of the civil union, without payment of a fee, provided that the civil union has not been dissolved and there is no pending dissolution proceeding.²⁹

In November of 2013, the United States District Court granted Vernita Gray and Patricia Ewert a temporary restraining order or preliminary injunction to obtain a marriage license prior to the effective date of this Act.³⁰ Vernita was terminally ill and almost certain to die before the effective date of the Act.³¹ The Court found the plaintiffs had established an irreparable injury and absence of an adequate remedy at law.³² Plaintiff had established a likelihood of success on the merits of their petition.³³ The Court found that the balance of hardships favored granting interlocutory injunctive relief, and that granting the temporary restraining order or preliminary injunction permitting the plaintiffs to be married before Vernita dies conforms to public interest.³⁴ The court said that given the Illinois General Assembly's recent enactment of Public Act 98-597, that the position reserving "marriage" to opposite-sex spouse as rationally furthering a legitimate public goal no longer has any meaningful significance.³⁵ The State has categorically disavowed any official policy of treating traditional marriage between opposite-sex partners as being in any way superior or preferable to same-sex marriages.³⁶

C. Disposition of Property 750 ILCS 5/503

Effective January 1, 2013, section 503 of the IMDMA was amended adding provisions about claims for dissipation of property.³⁷ When dividing marital property, the court is to consider dissipation by each party of the marital or non-marital property. A party's claim of dissipation is subject to the following conditions:

- (i) a notice of intent to claim dissipation shall be given no later than 60 days before trial or 30 days after discovery closes, whichever is later;
- (ii) the notice of intent to claim dissipation shall contain, at a minimum, a date or period of time during which the marriage began undergoing an

29. *Id.* (amending, 750 ILL. COMP. STAT. 76/65(b)).

30. *Gray & Ewert v. Orr in his official capacity as Cook County Clerk*, 2013 WL 6585592 (N.D. Ill.) (2013).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. 2012 Ill. Legis. Serv. P. A. 97-941 (S. B. 2569) (West 2014).

irretrievable breakdown, an identification of the property dissipated, and a date or period of time during which the dissipation occurred;

(iii) the notice of intent to claim dissipation shall be filed with the clerk of the court and be served pursuant to applicable rules;

(iv) no dissipation shall be deemed to have occurred prior to 5 years before the filing of the petition for dissolution of marriage, or 3 years after the party claiming dissipation knew or should have known of the dissipation.³⁸

Note, these changes apply only to petitions for dissolution of marriage filed on or after January 1, 2013.³⁹

D. Securing Maintenance with Life Insurance 750 ILCS 5/504

Effective January 1, 2013, Section 504 of the IMDMA was amended by adding provisions about maintenance being secured by life support.⁴⁰ Section (f) was added which states:

(f) An award ordered by a court upon entry of a dissolution judgment or upon entry of an award of maintenance following a reservation of maintenance in a dissolution judgment may be reasonably secured, in whole or in part, by life insurance on the payor's life on terms as to which the parties agree, or, if they do not agree, on such terms determined by the court, subject to the following:

(1) With respect to existing life insurance, provided the court is appraised through evidence, stipulation, or otherwise as to level of death benefits, premium, and other relevant data and makes findings relative thereto, the court may allocate death benefits, the right to assign death benefits, or the obligation for future premium payments between the parties as it deems just.

(2) To the extent the court determines that its award should be secured, in whole or in part, by new life insurance on the payor's life, the court may only order:

(i) that the payor cooperate on all appropriate steps for the payee to obtain such new life insurance;

38. 750 ILL. COMP. STAT. 5/503(d)(2) (2013).

39. 750 ILL. COMP. STAT. 5/503.

40. 2013 Ill. Legis. Serv. P. A. 97-608 (S. B. 1824) (West 2014).

(ii) that the payee, at his or her sole option and expense, may obtain such new life insurance on the payor's life up to a maximum level of death benefit coverage, or descending death benefit coverage, as is set by the court, such level not to exceed a reasonable amount in light of the court's award, with the payee or the payee's designee being the beneficiary of such life insurance.

In determining the maximum level of death benefit coverage, the court shall take into account all relevant facts and circumstances, including the impact on access to life insurance by the maintenance payor.⁴¹ If in resolving any issues under paragraph (2) of this subsection (f) a court reviews any submitted or proposed application for new insurance on the life of a maintenance payor, the review shall be *in camera*.⁴²

(3) A judgment shall expressly set forth that all death benefits paid under life insurance on a payor's life maintained or obtained pursuant to this subsection to secure maintenance are designated as excludable from the gross income of the maintenance payee under Section 71(b)(1)(B) of the Internal Revenue Code, unless an agreement or stipulation of the parties otherwise provides.⁴³

A recent case, *In re Marriage of Brankin*, recognized these amendments and remanded a case to the trial court to consider whether a maintenance award should be secured by a life insurance policy.⁴⁴

E. Child Support; Contempt; Penalties 750 ILCS 5/505

Section 505 of the IMDMA was amended effective January 1, 2013,⁴⁵ with minor sentence structure changes as well as with a few substantive changes. The section now includes educational needs in the factors that courts are to consider when determining child support obligations.⁴⁶ The amendment also added that educational needs and mental needs of a child are to be considered by the court as factors when making a deviation from child support guidelines, thereby making the paragraphs within this section consistent.⁴⁷ Finally, this amendment added paragraph 2.5, which states:

The court, in its discretion, in addition to setting child support pursuant to the guidelines and factors, may order either or both parents owing a duty

41. 750 ILL. COMP. STAT. 5/504(f) (West 2014).

42. *Id.*

43. *Id.*

44. *In re Marriage of Brankin*, 2012 IL App (2d) 110203.

45. 2013 Ill. Legis. Serv. P. A. 97-941 (S.B. 2569) (West 2014).

46. 750 ILL. COMP. STAT. 5/505 (a), (a)(2), (d)(5) (2013).

47. *Id.*

of support to a child of the marriage to contribute to the following expenses, if determined by the court to be reasonable:

- (a) health needs not covered by insurance;
- (b) child care;
- (c) education; and
- (d) extracurricular activities.⁴⁸

Section 505 was also amended effective January 1, 2013, adding a provision about contempt proceedings for persons who conduct a business or are self-employed.⁴⁹ The act now includes:

If a parent who is found guilty of contempt for failure to comply with an order to pay support is a person who conducts a business or who is self-employed, the court in addition to other penalties provided by law may order that the parent do one or more of the following: (i) provide the court monthly financial statements showing income and expenses from the business or the self-employment; (ii) seek employment and report periodically to the court with a diary, listing, or other memorandum of his or her employment search efforts; or (iii) report to the Department of Employment Security for job search services to find employment that will be subject to withholding for child support.⁵⁰

This Act also amended the Illinois Parentage Act⁵¹ and the Non-Support Punishment Act⁵² by adding the same provisions in the enforcement of judgment or order sections of these acts.

48. 750 ILL. COMP. STAT. 5/505 (2.5) (West 2014).

49. 2012 Ill. Legis. Serv. P. A. 97-1029 (S. B. 3549) (West 2014).

50. 750 ILL. COMP. STAT. 505 (d-5) (2013).

51. 750 ILL. COMP. STAT. 45/15 (b-5) (2013).

52. 750 ILL. COMP. STAT. 16/20(d-5) (2013).

F. Jurisdiction; Commencement of Custody Proceeding 750 ILCS 5/601

Effective January 25, 2013, the section 601 was amended⁵³ by adding provisions of the Criminal Code to paragraph (4)(c), which provides when grandparents who are parents or stepparents of a deceased parent may petition for custody when the surviving parent has received supervision or been convicted for certain crimes. The amendment added these references: Sections 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 11-1.70, 12C-5, 12C-10, 12C-35 12C-40, 12C-45, 18-6, and 19-6.

G. Joint Custody—Right of First Refusal 750 ILCS 5/602.3

The IMDMA was amended effective January 1, 2014, by adding section 602.3⁵⁴ as follows:

Care of minor children; right of first refusal.

(a) If the court awards joint custody under Section 602.1 or visitation right under Section 607, the court may consider, consistent with the best interest of the child as defined in Section 602, whether to award to one or both of the parties the right of first refusal to provide child care for the minor child or children during the other parent's normal parenting time, unless the need for child care is attributable to an emergency.

(b) As used in this Section, "right of first refusal" means that if a party intends to leave the minor child or children with a substitute child-care provider for a significant period of time, that party must first offer the other party an opportunity to personally care for the minor child or children. The parties may agree to a right of first refusal that is consistent with the best interest of the minor child or children. If there is no agreement and the court determines that a right of first refusal is in the best interest of the minor child or children, the court shall consider and make provisions in its order for:

(1) the length and kind of child-care requirements invoking the right of first refusal;

(2) notification of the other parent and for his or her response;

(3) transportation requirements; and

53. 2012 Ill. Legis. Serv. P. A. 97-1150 (H. B. 3804) (West 2014).

54. 2013 Ill. Legis. Serv. P. A. 98-462 (H.B. 2992) (West 2014).

(4) any other action necessary to protect and promote the best interest of the minor child or children.

(c) the right of first refusal may be enforced under Section 607.1 of this Act.

(d) the right of first refusal is terminated upon the termination of custody or visitation rights.⁵⁵

H. Temporary Orders 750 ILCS 5/603

Section 603(a) of the IMDMA was modified effective June 1, 2012,⁵⁶ to include where courts may now also consider “the provisions of subsection (f) of section 610” and “agreements of the parties if the court finds that the parties’ agreement is in the best interest of the child.”⁵⁷ Subsection (f) of section 610 (which was also amended by this same act) includes a provision about temporary modifications of custody or visitation for parents employed in the United States Armed Forces.⁵⁸

I. Professional Personnel 750 ILCS 5/604

Section 604(b) of the IMDMA was modified effective January 1, 2012,⁵⁹ to include a provision about professional personnel consulted by the court. This section now includes:

Professional personnel consulted by the court are subject to subpoena for the purposes of discovery, trial, or both. The court shall allocate the costs and fees of those professional personnel between the parties based upon the financial ability of each party and any other criteria the court considers appropriate. Upon the request of any party or upon the court’s own motion, the court may conduct a hearing as to the reasonableness of those fees and costs.⁶⁰

55. 750 ILL. COMP. STAT. 5/602.3 (West 2014).

56. 2011 Ill. Legis. Serv. P. A. 97-659 (H.B. 1589) (West 2014).

57. 750 ILL. COMP. STAT. 5/603(a) (2013).

58. 750 ILL. COMP. STAT. 5/610(f).

59. 2011 Ill. Legis. Serv. P. A. 97-47 (S. B.1753), (effective January 1, 2012) (West 2014).

60. 750 ILL. COMP. STAT. 5/604(b) (2013).

J. Hearings 750 ILCS 5/606

Section 606 of the IMDMA was modified effective June 1, 2012,⁶¹ with added provisions for parents in the United States Armed Forces. This section now includes:

(f) Custody and visitation proceedings in which a parent is a member of the United States Armed Forces who is deployed or who has orders to be deployed shall, upon the request of either party or on the court's own motion receive expedited priority in being set for hearing.

(g) In any custody or visitation proceeding in which a parent is a member of the United States Armed Forces who is deployed or who has orders to be deployed, the court shall, upon a request of the service member, permit the deployed parent who is unavailable to appear for the proceeding to testify by telephone, audiovisual means, or other electronic means. The court shall cooperate with the deployed parent in designating an appropriate location for the testimony.⁶²

K. Visitation 750 ILCS 5/607

Section 607 was amended effective June 1, 2012, to also include provisions about substituting others for visitation when parents deployed with the United States Armed Forces.⁶³ Section (h) was added which states:

(h) Upon motion, the court may allow a parent who is deployed or who has orders to be deployed as a member of the United States Armed Forces to designate a person known to the child to exercise reasonable substitute visitation on behalf of the deployed parent, if the court determines that substitute visitation is in the best interest of the child. In determining whether substitute visitation is in the best interest of the child, the court shall consider all of the relevant factors listed in subsection (a) of Section 602 and apply those factors to the person designated as a substitute for the deployed parent for visitation purposes.⁶⁴

Section 602 of the IMDMA provides the factors that courts are to consider when determining the best interest of the child in custody proceedings.⁶⁵

61. 2011 Ill. Legis. Serv. P. A. 97-659 (H.B. 1589) (effective June 1, 2012) (West 2014).

62. 750 ILL. COMP. STAT. 5/606(f), (g) (West 2014).

63. 2011 Ill. Legis. Serv. P. A. 97-659 (H.B. 1589) (effective June 1, 2012).

64. 750 ILL. COMP. STAT. 5/607(h) (West 2014).

65. 750 ILL. COMP. STAT. 5/602(a) (West 2014).

Section 5/607 was also amended effective January 25, 2013,⁶⁶ by adding provisions of the Criminal Code to paragraph (e), which provides limitations on who may seek visitation. The amendment added these references: Sections 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 11-1.70.⁶⁷

L. Enforcement of Visitation Orders 750 ILCS 5/607.1

The IMDMA was amended section 607.1 in August 2012,⁶⁸ adding alternatives for penalties for contempt orders when a person violates a visitation order and the person engaged in visitation abuse. Paragraph (c-1) states:

When the court issues an order holding a party in contempt for violation of a visitation order and finds that the party engaged in visitation abuse, the court may order one or more of the following:

(1) Suspension of a party's Illinois driving privileges pursuant to Section 7-703 of the Illinois Code until the court determines that the party is in compliance with the visitation order. The court may also order that a party be issued a family financial responsibility driving permit that would allow limited driving privileges for employment, for medical purposes, and to transport a child to or from scheduled visitation in order to comply with a visitation order in accordance with subsection (a-1) of Section 7-702.1 of the Illinois Vehicle Code.

(2) Placement of a party on probation with such conditions of probation as the court deems advisable.

(3) Sentencing a party to periodic imprisonment for a period not to exceed 6 months; provided, that the court may permit the party to be released for periods of time during the day or night to:

(A) work; or

(B) conduct a business or other self-employed occupation.

(4) Find that a party in engaging in visitation abuse is guilty of a petty offense and should be fined an amount of no more than \$500 for each finding of visitation abuse.⁶⁹

66. 2012 Ill. Serv. P. A. 97-1150 (H. B.3804) (West 2014).

67. 750 ILL. COMP. STAT. 5/607 (2013).

68. P. A. 97-1047, 750 ILL. COMP. STAT. 5/607.1 (c-1) (West 2014).

69. 750 ILL. COMP. STAT. 5/607.1 (2013).

M. Modification 750 ILCS 5/610

Section 610 was amended effective June 1, 2012, to include provisions about temporary modifications of custody and visitation orders during periods of a parent's deployment.⁷⁰ The new provisions state:

(f) A court may only provide for a temporary modification of a custody or visitation order during a period of a parent's deployment by the United States Armed Forces in order to make reasonable accommodations necessitated by the deployment. The temporary order shall specify that deployment is the basis for the order and shall include provisions for:

(1) custody or reasonable visitation during a period of leave granted to the deployed parent if the custody or reasonable visitation is in the child's best interest;

(2) if appropriate, visitation by electronic communication; and

(3) the court's reservation of jurisdiction to modify or terminate the temporary modification order upon the termination of the deployed parent's deployment upon such terms and conditions as the court may deem necessary to serve the child's best interest at the time of the termination of the deployment.

(g) A party's past, current, or possible future absence or relocation, or failure to comply with the court's orders on custody, visitation, or parenting time may not, by itself, be sufficient to justify a modification of a prior order if the reason for the absence, relocation or failure to comply is the party's deployment as a member of the United States Armed Forces.

III. CASE LAW

A. Education Expenses 750 ILCS 5/513(a)(2)

Application of the IMDMA's provisions on educational expenses, section 5/513 received much attention during the time frame covered by this article.⁷¹ This section provides, "The authority under this Section to make provision for educational expenses, except where the child is mentally or physically disabled and not otherwise emancipated, terminates when the child receives a baccalaureate degree."⁷²

70. 2011 Ill. Legis. Serv. P. A. 97-659 (H.B. 1589) (effective June 1, 2012) (West 2014).

71. 750 ILL. COMP. STAT. 5/513(a)(2) (2013).

72. 750 ILL. COMP. STAT. 5/513(a)(2) (2013).

In *In re Marriage of Chee*, the court addressed whether under section 513(a)(2) of the IMDMA, a court has authority to adjudicate a petition to share a child's undergraduate school expenses, even if the petition is filed after the child has graduated.⁷³ The court ruled that the provision of section 513 that states, "the authority to make provision for education expenses . . . terminates when the child receives a baccalaureate degree" means that courts are precluded from awarding expenses for post-baccalaureate degrees.⁷⁴ Courts are not precluded from considering petitions for contribution of college expenses simply on the basis that the petition for contribution is filed after the baccalaureate degree is received.⁷⁵ In *Chee*, the proceeding for dissolution was filed after his children's educational expenses had been incurred.⁷⁶ This case did not involve modification of child support.

The Illinois Supreme Court determined the appropriate means to apportion post dissolution decree college expenses where the judgment of dissolution reserved the issue for future consideration in *In re Marriage of Petersen*.⁷⁷ The Court explained that Illinois courts have consistently held that section 513 expenses are a form of child support and that section 513 needs to be read in conjunction with section 505.⁷⁸ The Court then applied section 5/510(a) which states, "Except as otherwise provided . . . the provisions of any judgment respecting maintenance or support may be modified only as to installments accruing subsequent to due notice by the moving party of the filing of the motion for modification."⁷⁹ The Court concluded that the college expenses, which predated the petition for educational expenses could not be ordered because this would result in a modification of support prior to due notice of the filing of the motion for modification.⁸⁰ The Petitioner argued that the petition was not one that sought modification as the term is used in section 510, because the original decree reserved the issue rather than obligated the father to provided educational expenses.⁸¹ This argument was rejected by the Court.⁸² The court said,

Given these commonly understood usages of the word "modify," we hold that the legislature intended the verb "modify" as it is used in section 510

73. *In re Marriage of Chee*, 2011 IL App (1st) 102797.

74. *Id.*

75. *Id.* at ¶ 17.

76. *Id.*

77. *In re Marriage of Petersen*, 2011 IL 110984, ¶ 1.

78. *Id.* at ¶ 13.

79. *Id.* (citing 750 ILL. COMP. STAT. 5/510(a)).

80. *Id.* at ¶ 18.

81. *Id.*

82. *Id.*

to connote any action taken to adjust, change or alter the obligations of one or more of the parties subsequent to the entry of the final divorce degree.⁸³

In remanding the case to the circuit court to recalculate the amount of educational expenses that the father was to contribute the court noted, a circuit court may order either or both parties to pay educational expenses “as equity may require.”⁸⁴ “The factors to be considered include, amongst other things, the financial resources of both parties.”⁸⁵ Therefore, the court remanded this matter to the circuit court with instructions to recalculate Kevin’s obligation for educational expenses, taking into account, “all relevant factors that appear reasonable and necessary” within 750 ILCS 5/513(b), including the fact that Janet’s financial resources may have been depleted by the cost of the college expenses that were incurred prior to the filing of the petition for educational expenses.⁸⁶ Although the father could not be obligated to pay for educational expenses prior to the filing of the petition, the court could consider circumstances resulting from things that occurred prior to the petition’s filing.

The Illinois First District Appellate Court, addressed whether a child as a third party beneficiary of his parents’ marital settlement agreement is barred from seeking retroactive relief for college expenses incurred prior to the filing date of the petition to enforce a provision of his parents’ marital settlement agreement to contribute to his college education.⁸⁷ In this case, the settlement agreement provided that each of the parties “shall contribute to the trade school or college and professional school education expenses of their child in accordance with section 513.”⁸⁸ The court specifically states that this case is distinguishable from *Petersen* because here the obligation of the parties was clearly and affirmatively stated and was not expressly reserved.⁸⁹ The court noted, “We reach this conclusion even though the actual allocation of those expenses was not made at the time the judgment of dissolution was entered.”⁹⁰ Additionally, the court found the holding in *Petersen* to be inapplicable to the present case as educational expenses were not expressly reserved for future consideration by the trial court.⁹¹ The court also concluded that *Petersen* was inapplicable because this case involved an action by a third-party beneficiary seeking enforcement of the

83. *Id.* ¶ 16.

84. *Id.* at ¶ 25.

85. *Id.*

86. *Id.*

87. *In re Marriage of S. Spircoff*, 2011 IL App (1st) 103189, ¶ 1.

88. *Id.* at ¶ 6.

89. *Id.* at ¶ 17.

90. *Id.*

91. *Id.* at ¶ 20.

provisions of a marital settlement agreement, which is, “a breach of contract action, and not an action to modify a section 513 order.”⁹² The court found, “*Petersen* does not bar an action by a third-party beneficiary to retroactively enforce a provision of his or her parents’ marital settlement agreement related to payment of educational expenses where such payment of expenses was not expressly reserved for future consideration by the trial court in the initial proceedings.”⁹³

The Illinois Second District Appellate Court next weighed in on the issue of college expenses in *In re Marriage of Koenig*.⁹⁴ The court gives an in-depth analysis of the Illinois Supreme Court’s decision in *Petersen*,⁹⁵ and the First District’s decision in *Spircoff*.⁹⁶ In *Koenig*, the mother filed a post-decree petition for contribution of college and law school expenses that were incurred prior to the filing of the petition.⁹⁷ The mother argued that *Petersen* was inapplicable because the parties’ settlement agreement did not contain a reservation, but instead assigned to the parties financial responsibility for the college and postgraduate expenses.⁹⁸ The court contrasted the underlying judgment in *Petersen* to the parties’ settlement agreement in the present case.⁹⁹ In *Petersen*, the judgment provided a blanket reservation under section 513 with no mention of either party being obligated to pay college expenses.¹⁰⁰ Prior to the filing of the petition for educational expenses, the father had no concrete obligation to provide for educational expenses.¹⁰¹ “Thus, by filing the petition for contribution for college expenses, Janet was seeking to change the *status quo* between the parties.”¹⁰² This brought the case within the purview of section 510, which limits modifications of maintenance and support “only as to installments accruing subsequent to the filing of a modification petition.”¹⁰³ In comparison, the underlying settlement agreement that was incorporated into the judgment did not contain a reservation clause on the issue of college expenses nor did it make any reference to section 513.¹⁰⁴ Rather, it “affirmatively assigned responsibility to both parties for . . . college and postgraduate expenses, and therefore, any order entered pursuant to Joyce’s petition would not “adjust, change or alter” this obligation as set forth in the

92. *Id.* at ¶ 21.

93. *Id.* at ¶ 23.

94. *In re Marriage of Koenig*, 2012 IL App (2d) 110503.

95. *In re Marriage of Petersen*, 2011 IL 110984.

96. *In re Marriage of S. Spircoff*, 2011 IL App (1st) 103189.

97. *Koenig*, 2012 IL App (2d) 110503, ¶ 1.

98. *Id.* at ¶ 2.

99. *Id.*

100. *Id.* at ¶ 12.

101. *Id.* at ¶ 14 (citing *Petersen*, 2011 IL 110984, ¶ 18).

102. *Id.*

103. *Id.*

104. *Id.* at ¶ 17.

settlement agreement's plain language."¹⁰⁵ The court concluded that, "it was inconsequential that the settlement agreement did not set a dollar amount or some basis for determining contributions, since contributions could always be settled by the trial court,"¹⁰⁶ and found that "Joyce is not barred from retroactively seeking to enforce the provision of the settlement agreement related to responsibility for Tiffany's college and postgraduate expenses."¹⁰⁷

In *In re Marriage of Vondra*, the court addressed whether adult children have standing to intervene in divorce proceedings where the divorce was still pending and the parties had not yet executed a settlement agreement providing for educational expenses.¹⁰⁸ The court ruled that the trial court did not err in finding that the children lacked standing to bring their claim and denying their request to join their parents' dissolution proceedings.¹⁰⁹ The court stated that the Marriage Act itself "creates no right in a child to directly petition the court for benefits which are potentially available under its provisions."¹¹⁰ "Therefore, the trial court has no authority to consider an application for such expenses where the settlement agreement contains no specific provision for educational expenses."¹¹¹

In summary, at this point, it seems that parties may seek payment of college expenses that predate a filing of a petition for college expenses when an underlying judgment exists that affirmatively sets forth a duty to provide support of college expenses even though the amount of support may not have been determined or stated in the judgment. When no affirmative duty to contribute to college expenses has been stated in the judgment, and the issue is simply reserved, then any post-petition for contribution for college expenses should be filed prior to the expenses being incurred, otherwise, the expenses which predate the filing of the petition would be barred by section 510 as a modification of child support. Even in this situation, a trial court can still look at the parties' financial circumstances, which may include that one party's resources have been depleted by incurring college expenses incurred prior to the filing of the petition.

105. *Id.*

106. *Id.*

107. *Id.*

108. *In re Marriage of Vondra*, 2013 IL App (1st) 123025, ¶ 11.

109. *Id.* at ¶ 8.

110. *Id.* at ¶ 11 (citing *Miller v. Miller* 160 Ill.App.3d 354, 356, 513 N.E. 2d 605 (1987)).

111. *Id.* (citing *In re Marriage of Treacy*, 204 Ill.App.3d 282, 288, 562 N.E.2d 266 (1990)).

B. Disgorgement of Attorneys Fees 501(c-1), Guardian Ad Litem Fees and Contempt

In *In re Marriage of Nash*,¹¹² the court addressed application of section 501(c-1),¹¹³ which provides for payment of interim attorneys fees. The attorney, who was ordered to pay interim attorneys fees out of the retainer paid to his firm, had refused to pay the fees and was held in contempt, appealed this contempt order. The court reversed the trial court's order for disgorgement for failing to make a finding that both petitioner and respondent lacked financial ability or access to assets or income for reasonable attorneys fees or costs.¹¹⁴ Because the court's order on attorneys fees was reversed, the appellate court did not address the attorney's argument that section 501(c-1)(3) was unconstitutionally applied to him by ordering him to pay the interim fees out of the retainer paid to and earned by the law firm, and instead, the court vacated the contempt order.¹¹⁵

In *In re Marriage of Radzik and Agrella*,¹¹⁶ the court found that when a trial court received virtually no evidence regarding respondent's present ability to pay the amount that the court awarded, that the court abused its discretion.¹¹⁷ The court reversed a trial court's order for payment of attorney's fees and vacated a finding of contempt.¹¹⁸ The court found that "the court abused its discretion in determining that petitioner established respondent's ability to pay, because it received virtually no evidence regarding respondent's present ability to pay the amount that the court awarded."¹¹⁹ Here, the petition for interim fees contained no affidavit from the petitioner or her attorneys. Section 501 (c-1) specifically requires that "at least one affidavit be attached, because, while the proceeding may be nonevidentiary, proof may instead be provided by the required affidavits."¹²⁰ The court also ruled, "while IRAs may be ordered liquidated

112. *In re Marriage of Nash*, 2012 IL App (1st) 113724.

113. 750 ILL. COMP. STAT. 501(c-1)(3) (West 2010). In any proceeding under this subsection (c-1), the court (or hearing officer) shall assess an interim award against an opposing party in an amount necessary to enable the petitioning party to participate adequately in the litigation, upon findings that the party from whom attorney's fees and costs are sought has the financial ability to pay reasonable amounts and that the party seeking attorney's fees and costs lacks sufficient access to assets or income to pay reasonable amounts. ...If the court finds that both parties lack financial ability or access to assets or income for reasonable attorney's fees and costs, the court (or hearing officer) shall enter an order that allocates available funds for each party's counsel, including retainers or interim payments, or both, previously paid, in a manner that achieves substantial parity between the parties. *Id.*

114. *Id.* at ¶ 23.

115. *Id.* at ¶ 30.

116. *In re Marriage of Radzik and Agrella*, 2011 IL App (2d) 100374.

117. *See id.* at ¶ 51.

118. *Id.* at ¶ 2.

119. *Id.* at ¶ 51.

120. *Id.* at ¶ 48.

to enforce support judgments, they remain exempt from judgments for interim attorney fees.”¹²¹ The court concluded that the 1997 amendments to the IMDMA, while seeking to prevent the financially disadvantaged spouse from being “outlitigated” by the financially superior spouse, “merely overhauled the methods by which and timing of when attorneys may obtain fees; they did not alter any of the bases for rulings in *Jukubik*,¹²² *Walsh*,¹²³ and *Campbell*¹²⁴ that section 12-1006 of the Code exempts retirement accounts from attorney fee awards.”¹²⁵

The Illinois Supreme Court also addressed the issue of disgorgement and contempt in *In re Marriage of Earlywine*.¹²⁶ The trial court entered a turnover order against husband’s counsel, ordering him to turn over or disgorge to respondent’s attorney half of attorney fees previously paid to him as advance payment retainer, and holding husband’s attorney in friendly contempt for purposes of the appeal.¹²⁷ The trial counsel for the husband contended that his client’s funds were an advance retainer and provided the court with a copy of the retainer agreement, which set forth the special purpose of the advance payment retainer.¹²⁸ Counsel argued that a party to a dissolution should be able to use an advance retainer agreement to shield attorney fees from being turned over to opposing counsel.¹²⁹ The Illinois Supreme Court disagreed. The Supreme Court gives the history of three types of retainers available to lawyers and clients in Illinois.¹³⁰ “The first type, a “general,” “true”, or “classic” retainer is paid to a lawyer to secure his or her availability during a specified time or for a specified matter.”¹³¹ The Court stated, “Such a retainer is earned when paid and immediately becomes the property of the lawyer, whether or not the lawyer ever performs any services.”¹³² The second type of retainer is a security retainer, “which remains the property of the client until the lawyer applies it

121. *Id.* at ¶ 55.

122. *Jakubik v. Jakubik*, 208 Ill.App. 3d 119, 566 N.E. 2d 808 (1991) (Retirement accounts are not exempt under section 12-1006 from judgment for support orders, they remain exempt for orders pertaining to attorney fees).

123. *In re Marriage of Walsh*, 109 Ill. App. 3d 171, 176-177, 440 N.E. 2d 310 (1982) (The Dissolution Act empowers a trial court to order that fees and costs be directly paid to the attorney, who may then enforce the judgment in his or her own name, *not* to order an asset sold for direct payment of fees).

124. *In re Marriage of Campbell*, 261 Ill. App. 3d 483, 490, 633 N. E. 2d 1230 (1992) (Trial court may not order a marital asset sold in order to satisfy attorney fee obligations).

125. *Radzik and Agrella*, 2011 IL App (2d) 100374, ¶ 55.

126. *In re Marriage of Earlywine*, 2013 IL 114779.

127. *Id.* at ¶ 1.

128. *Id.* at ¶ 6.

129. *Id.* at ¶ 20.

130. *Id.* at ¶¶ 15-19.

131. *Id.* at ¶ 15.

132. *Id.* (citing *Dowling v. Chicago Options Associates, Inc.*, 226 Ill.2d 277, 292, 875 N.E. 2d 1012 (2007)).

to charges for services actually rendered.”¹³³ Pursuant to the Illinois Rules of Professional Conduct, a security retainer must be deposited in a client trust account and kept separate from the lawyer’s own funds.¹³⁴ The Court then explains that advance payment retainers consist of a present payment to the lawyer in exchange for the commitment to provide legal services in the future.¹³⁵ The Court explained that, “Ownership of an advance payment retainer passes to the lawyer immediately upon payment.”¹³⁶ Accordingly, “the funds must be deposited in the lawyer’s general account and may not be placed in a client’s trust account due to the prohibition against commingling of funds.”¹³⁷

The Court found that usage of “an advance payment retainer to ‘protect’ a client’s funds from turnover undermines the purpose of the leveling of the playing field rules in the Act and renders these rules a nullity.”¹³⁸ The Court held that, “advance payment retainers in dissolution cases are subject to disgorgement pursuant to section 501(c-1)(3) of the Act.”¹³⁹ To hold otherwise would defeat the express purpose of the Act and render the “leveling of the playing field” provisions powerless.”¹⁴⁰ The Court rejected the argument that section 501 (c-1)’s provision for disgorgement of attorney fees irreconcilably conflicts with Rule 1.15 of the Illinois Rules of Professional Conduct.¹⁴¹ The Court said, “The statute does not infringe upon the court’s authority to regulate court matters. Rather it leaves to the discretion of the court whether, and in what amount, interim attorney fees may be awarded.”¹⁴² Finally, the Court found that James did not have standing to make a claim that the statute violates a first amendment in that it infringes upon a client’s access to courts and the right to retain counsel because he was not the person whose rights are allegedly being infringed.¹⁴³

C. Guardian Ad Litem’s Role and Conflicts with Serving as Mediator

In *In re Marriage of Petrik*, the appellate court addressed whether a court abused its discretion in reappointing a guardian ad litem when no dissolution proceedings were pending.¹⁴⁴ The Appellate Court reversed the

133. *Id.*

134. *Id.* (citing ILL. R. PROF. CONDUCT R. 1.15(a)).

135. *Id.* at ¶ 16.

136. *Id.*

137. *Id.*

138. *Id.* at ¶ 21.

139. *Id.* at ¶ 29.

140. *Id.* at ¶ 32.

141. *Id.*

142. *Id.* at ¶ 33.

143. *Id.* at ¶ 34.

144. *In re Marriage of Petrick*, IL App 2d (2012) 110495.

trial court finding that the IMDMA “does not permit a trial court to modify a judgment of dissolution of marriage *sua sponte* when no post-dissolution petitions have been filed.”¹⁴⁵ In regards to modification of a child custody order, the Court stated that the section 601(d) of the Act dictates that, “[p]roceedings for modification of a previous custody order. . . must be initiated by serving a written notice and a copy of the petition for modification upon a child’s parent, guardian and custodian at least 30 days prior to hearing on the petition.”¹⁴⁶

The *Petrik* court also discusses the conflicts of interest arising out of appointments as both mediator and guardian ad litem in the same matter. “Given a mediator’s obligation to keep mediation communications confidential, contrasted with a GAL’s duty to testify or submit a written report to the court, an attorney’s exposure to confidential information as a mediator would undermine his or her ability to subsequently fulfill his or role as GAL.”¹⁴⁷

D. Child Representative’s Absolute Immunity 750 ILCS 5/506(a)(3)

In *Vlastelica v. Brend*, the First District Appellate Court held that “the child representative is entitled to absolute immunity for his work as an advocate occurring within the course of his court-appointed duties.”¹⁴⁸

E. Contempt for Non-Payment of Child Support

In *In re Marriage of Kolessar and Signore*, the court found the trial court erred in finding that the imposition of statutory interest on arrearages was discretionary.¹⁴⁹ The IMDMA and Code of Civil Procedure were both amended in 1987, “to provide that support orders are judgments against the person obligated to pay, and that “[e]very judgment . . . arising by operation of law from child support orders shall bear interest thereon as provided in Section 2-1303.”¹⁵⁰ Further, the parties’ agreed order was silent on the issue of statutory interest pertaining to arrearages. The Court continued stating that, “since the Marriage Act requires that interest be paid on orders for child support, and the agreed orders at issue did not contain an explicit

145. *Id.* at ¶ 21 (citing *In re Custody of Ayala*, 344 Ill. App. 3d 574, 584-85, 800 N.E. 2d 524 (2003); *In re Marriage of Fox*, 191 Ill. App. 3d 514, 520-22, 548 N. E. 2d 71 (1989); *Ligon v. Williams*, 264 Ill. App. 3d 701, 708-09, 637 N. E. 2d 633 (1994)).

146. *Id.* (citing 750 2013 IL 1147795/601(d) (West 2008)).

147. *Id.* at ¶ 41.

148. *Vlastelica v. Brend*, 2011 IL App (1st) 102587.

149. *In re Marriage of Kolessar and Signore*, 2012 IL App (1st) 102448, ¶ 16.

150. *Id.* ¶ 18 (referencing 750 2013 IL 1147795/101 *et seq.* (West 2006); 735 ILL. COMP. STAT. 5/12-109 (West 2006)).

waiver . . . of her right to the statutory interest, the trial court erred in failing to award interest on the arrearages.”¹⁵¹

F. Removal

Several cases were published by the appellate courts on the issue of removal.

In *In re Marriage of D.T. W. and S. L. W.*, the court reiterated that the standard of review in removal cases is whether the trial court’s judgment was against the manifest weight of the evidence.¹⁵² “There is a strong and compelling presumption in favor of the result reached by the trial court in a removal case.”¹⁵³ In this case, the court upheld the trial court’s decision. The courts in *In re Marriage of Demaret*,¹⁵⁴ and *In re Marriage of Dorfman*,¹⁵⁵ both upheld trial courts’ decisions denying removal. These courts also applied the *Eckert* factors and found that the trial court’s decision was not against the manifest weight of the evidence.¹⁵⁶

In two cases, *Shinall v. Carter*¹⁵⁷ and *Banister v. Partridge*,¹⁵⁸ the appellate courts reversed the trial court’s determinations on removal. In *Shinall*,¹⁵⁹ the appellate court applied the *Eckert* factors.¹⁶⁰ This court emphasized that the father had assiduously exercised his visitation rights and that courts should be reluctant to interfere with these rights by allowing removal for unpersuasive or inadequate reasons.¹⁶¹ In *Banister*,¹⁶² even though the court acknowledged that a trial court’s determination on removal should not be reversed unless it is against the manifest weight of the evidence,¹⁶³ the court reversed the trial court’s order that denied the mother’s leave to remove a child to Maine.¹⁶⁴

The Illinois Supreme Court addressed removal in *In re Marriage of Coulter and Trinidad*.¹⁶⁵ In this case, the parties had entered into a joint parenting agreement, which set forth a removal provision wherein after the expiration of a period of time, the mother would be allowed to remove the

151. *Id.* at ¶ 21.

152. *In re Marriage of D.T.W. and S. L. W.*, 2011 IL App (1st) 111225.

153. *Id.* at ¶16 (citing *In re the Marriage of Eckert*, 119 Ill.2d 316, 330, 518 N.E. 2d 1041 (1988)).

154. *In re Marriage of Demaret*, 2012 IL App (1st) 111916.

155. *In re Marriage of Dorfman*, 2011 IL App (3d) 11099.

156. *Demaret*, 2012 IL App (1st) 111916, ¶ 65; *Dorfman*, 2011 IL App (3d) 11099, ¶ 49.

157. *Shinall v. Carter*, 2012 IL App (3d) 110302.

158. *Banister v. Partridge*, 2013 IL App (4th) 120916.

159. *Shinall*, 2012 IL App (3d) 110302.

160. *Id.* at ¶ 46.

161. *Id.* at ¶ 48.

162. *Banister*, 2013 IL App (4th) 120916.

163. *Id.* at ¶ 51.

164. *Id.* at ¶ 5.

165. *In re Marriage of Coulter and Trinidad*, 2012 IL 113474.

children to California.¹⁶⁶ This agreement was incorporated into the judgment of dissolution of marriage.¹⁶⁷ Two months before the expiration of the time period for mediation that the parties agreed to in the joint parenting agreement, the father filed an emergency petition asking the court to enjoin the mother from removing the children to California.¹⁶⁸ The mother responded by filing a petition for temporary removal noting that removal was allowed under the joint parenting agreement.¹⁶⁹ The trial court denied the petition for the injunction.¹⁷⁰ The father took an interlocutory appeal.¹⁷¹ The appellate court reversed the trial court by finding that it had abused its discretion by denying the preliminary injunction.¹⁷² In its discussion about joint parenting agreements, the Supreme Court noted that joint parenting agreements that are set forth in the judgment or incorporated by reference are enforceable both as an order of the court and a contract. Joint parenting agreements are not expressly incorporated in the judgment, but are merely identified and approved, must be enforced as a contract.” The Court stated that, “this ability to treat the JPA as contract alone allows parties to agree to a term that the court would not have authority to order, for example, an agreement that the parents will pay for a child’s postgraduate education.”¹⁷³ The Supreme Court reversed the Appellate Court and agreed with the mother that the removal provisions in the joint parenting agreement, which were incorporated into the judgment of dissolution of marriage, were enforceable as an order of the court.¹⁷⁴

The Court determined that the reliance on *In re Marriage of Boehmer*, was misplaced.¹⁷⁵ In that case, the parents had entered an agreement about removal that had not been presented to the court.¹⁷⁶ The court had not entered an order allowing removal and, therefore, was asked for the first time to make a determination as to the children’s best interest.¹⁷⁷ The *Boehmer* Court found in that case that the agreement was insufficient evidence to support a finding that removal was in the child’s best interest.¹⁷⁸ The *Coulter and Trinidad* Court noted that in the instant case the father was not entirely without recourse.¹⁷⁹ If the father thought, “circumstances had

166. *Id.* at ¶ 1.

167. *Id.* at ¶ 3.

168. *Id.* at ¶ 5.

169. *Id.* at ¶ 6.

170. *Id.* at ¶ 7.

171. *Id.* at ¶ 9.

172. *Id.*

173. *Id.* at ¶ 17.

174. *Id.* at ¶ 33.

175. *In re Marriage of Boehmer*, 371 Ill. App. 3d 1154, 864 N.E. 2d 327 (2007).

176. *Id.* at 1155-56, 864 N.E. 2d at 328-29.

177. *Id.* at 1156, 864 N.E. 2d at 329.

178. *Id.* at 1160, 864 N.E. 2d 333.

179. *Coulter and Trinidad*, 2012 IL 113474, ¶ 27.

changed so significantly since the judgment was entered that a modification of custody would be appropriate, he was free to seek modification of custody pursuant to section 60 of the Act.¹⁸⁰

G. Child Support when Joint Custody Ordered-750 ILCS 505(a)(2)

In *In re Marriage of Smith*,¹⁸¹ the court addressed the law that should be applied for calculating child support when the parents share joint custody. Since the parties share custody, the trial court had two options in determining child support: (1) apportion the percentage between the parties; or (2) consider the factors in section 505(a)(2) of the Act and award an alternative figure.¹⁸² The court found that the record made it clear that the court had not reviewed the factors in section 505(a)(2), but had simply awarded the statutory guideline of twenty-percent, and remanded the case for proper determination of child support.¹⁸³

H. Parentage Judgment Establishing Father-Child Relationship is Not a “Custody Judgment” under the Parentage Act

In *In re B. B. and K. B.*¹⁸⁴, the Illinois Fourth District Appellate Court addressed whether under section 14(a)(2) of the Parentage Act,¹⁸⁵ a child support order was a judgment awarding mother custody of the children, thereby making the father’s petition for custody a petition to modify custody and requiring the children’s father to prove that the children were seriously endangered since two years had not lapsed since the judgment was entered.¹⁸⁶ Section 14(a)(2) states:

If a judgment of parentage contains no explicit award of custody, the establishment of a support obligation or of visitation rights in one parent shall be considered a judgment granting custody to the other parent. If the parentage judgment contains no such provisions, custody shall be presumed to be with the mother; however, that presumption shall not apply if the father has had physical custody for at least 6 months prior to the date that mother seeks to enforce custodial rights.¹⁸⁷

180. *Id.* at ¶ 35.

181. *In re Marriage of Smith*, 2012 IL App 2d 110522.

182. *Id.* at ¶ 66 (citing Reppen-Sonneson, 299 Ill.App. 3d 691, 695, 701 N.E. 2d 1159).

183. *Id.* at ¶ 66.

184. *In re B. B. and K. B.*, 2011 IL App (4th) 110521.

185. 750 ILL. COMP. STAT. 45/14(a)(2) (West Supp. 2003).

186. *B. B. and K. B.*, 2011 IL App (4th) 110521, ¶ 6.

187. 750 ILL. COMP. STAT. 14(a)(2) (West Supp. 2003).

In this case, parentage had been established in a 2004 parentage judgment.¹⁸⁸ This judgment did not address support or visitation. Therefore, the court found that this judgment did not constitute a custody judgment.¹⁸⁹ The mother argued that a permanent child-support order entered in 2010 constituted a custody judgment under the first sentence of section 14(a)(2).¹⁹⁰ The father asserted that a temporary child-support order in 2003 was a custody judgment.¹⁹¹ The court instead found that the “Parentage Act expressly applies to parentage judgments and does not address temporary child-support orders entered before the parentage judgment or support orders entered after a final parentage judgment.”¹⁹² The Court said:

The first sentence of section 14(a)(2) expressly states visitation rights or a support obligation in one parent contained in a *parentage judgment* must be treated as a custody judgment in favor of the other parent. (citation omitted). However, the second sentence does not use the phrase “shall be considered a judgment granting custody. (citation omitted). It merely provides a *presumption* the other has custody of the children and even specifies a circumstance under which the presumption would not apply. (citation omitted). “[A] presumption is a rule of law that requires the fact finder to take as established the existence of a fact, *i.e.*, the presumed fact, after certain other facts, *i.e.*, basic facts, have been established unless sufficient evidence is introduced tending to rebut the presumed fact” (citation omitted). On the other hand, a “judgment” is a “court’s official decision with respect to the rights and obligations of parties to a lawsuit.” (citation omitted). With section 14(a)(2), the statutory presumption exists because no action by a court existed to show a determination of the parties’ custodial rights. Thus, in this case, since the court’s June 2004 parentage judgment does not address support or visitation, that judgment does not constitute a custody judgment.¹⁹³

I. Standard to be Applied when a Biological Father Seeks Visitation Privileges after a Determination of Parentage

In *In re Parentage of J.W.*,¹⁹⁴ the Illinois Supreme Court ruled when a biological father seeks visitation privileges after a determination of parentage under the Parentage Act the best interests of the child standard in section 602 of the IMDMA should be applied and not the standards in

188. *Id.* at ¶ 6.

189. *Id.* at ¶ 24.

190. *Id.* ¶ 26.

191. *Id.* Note the temporary child-support order had been vacated.

192. *Id.*

193. *Id.* at ¶ 24.

194. *In re Parentage of J.W.*, 2013 IL 114817.

section 607(a) of the IMDMA, which give a noncustodial parent “a rebuttable presumption of reasonable visitation unless it can be shown that visitation would seriously endanger the child’s physical, mental, moral or emotional health.”¹⁹⁵ “The initial burden is on the noncustodial parent to show that visitation will be in the best interests of the child pursuant to section 602.”¹⁹⁶ The Court gives an analysis of the presumptive right to visitation when a dissolution of a marriage occurs and contrasts this to actions under the Parentage Act. “[T]he presumptive right to visitation in section 607(a) of the Marriage Act, drafted over 30 years ago, is in keeping with the traditional model of a family paradigm, where each person has presumably exercised custody over the child and one parent will now be granted custody and the other reasonable visitation.”¹⁹⁷ “Such a presumption reflects a legislative recognition of the need to protect the pre-existing parent-child bond that presumably developed prior to the divorce or separation of two parents.”¹⁹⁸

In contrast, “there are many factors that may be relevant to whether visitation is in a child’s best interests in the context of a paternity action.”¹⁹⁹ Moreover, the plain language of section 14(a)(1), in which gives the court discretion in awarding visitation and requiring “a *finding* in the best interests of the child,” contemplates a hearing where the court has the flexibility to consider whether, and to what extent, the biological father may now exercise visitation rights with respect to the child.”²⁰⁰ “Accordingly, the “serious endangerment” standard under section 607(a) would undercut the court’s authority under section 14(a)(1) of the Parentage Act to deliberate and weigh factors relevant to making a “finding in the best interests of the child.”²⁰¹ The court said, “[t]o the extent that *Wenaelman, Jines* and *In re Parentage of Melton* contradict our conclusion, they are expressly overruled.”²⁰²

In *Wittendorf v. Worthington*, the Illinois Fourth District Appellate Court also addressed the standard that should be applied in visitation cases when visitation privileges are considered under an action under the Parentage Act.²⁰³ The court used the same standard that was later pronounced by the Illinois Supreme Court in *In re Parentage of J. W.*,²⁰⁴

195. 750 ILL. COMP. STAT. 5/607(a) (West 2010).

196. *Id.* at ¶ 2.

197. *Id.* at ¶ 47.

198. *Id.*

199. *Id.* at ¶ 49.

200. (Emphasis added.) (citing 750 ILL. COMP. STAT. 45/14(a)(1) (West 2010); J.S.A., 224 Ill.2d 182, 212, 863 N.E.2d 236 (2007)).

201. *Id.* at ¶ 50.

202. *Id.* at ¶ 53.

203. *Wittendorf v. Worthington*, 2012 IL App (4th) 120525.

204. *In re Parentage of J.W.* 2013 IL 114817.

which is the best interest standard set forth in section 602.²⁰⁵ The court also reversed a visitation schedule that did not provide for a gradual reintroduction of the father and child finding that the court failed to account for the child's tender age and lack of familiarity with the father.²⁰⁶

J. Division of Marital Property—750 ILCS 5/503(d)

In *In re Marriage of Smith*,²⁰⁷ the court reversed a trial court's division of marital property when the record reflected that the trial court made the comment that "with regard to any and all pensions . . . a portion earned during the marriage should be divided half to each side." The court found that these comments indicated that the trial court did not review the relevant factors of 750 ILCS 5/503(d), and that this was an abuse of discretion.²⁰⁸ The court remanded the case to the trial court.²⁰⁹

K. Property Valuation in Bifurcated Cases—*In re Marriage of Mathis*

In a very lengthy decision that had three dissents, the Illinois Supreme Court answered the question,

In a bifurcated dissolution [of marriage] proceeding, when a grounds judgment has been entered, and when there is a lengthy delay between the date of the entry of the grounds judgment and the hearing on ancillary issues, is the appropriate date for valuation of marital property the date of dissolution or a date as close as practicable to the date of trial of the ancillary issues?²¹⁰

The Court held, "[I]n a bifurcated dissolution proceeding, the date of valuation for marital property is the date the court enters judgment for dissolution following a trial on grounds for dissolution."²¹¹ The court encourages future litigants and their counsel to remain mindful of the pitfalls associated with bifurcation.²¹²

205. *Wittendorf*, 2012 IL App (4th) 120525, ¶ 47.

206. *Id.* at ¶ 59.

207. *In re Marriage of Smith*, 2012 IL App 2d 110522.

208. *Id.* at ¶ 75.

209. *Id.* at ¶ 76.

210. *In re Marriage of Mathis*, 2012 IL 113496.

211. *Id.* at ¶ 30.

212. *Id.* at ¶ 32.

L. Pension Survivor Benefits

In *In re Marriage of Winter*, the surviving ex-spouse petitioned the court to use its equitable powers to order a pension fund to distribute her ex-husband's survivor benefits to her upon his death.²¹³ The appellate court affirmed the trial court's finding that the surviving ex-spouse was not entitled to a surviving spouse benefit because she was not a surviving spouse.²¹⁴ The court distinguishes the facts in this case from a prior Illinois Supreme Court decision of which found that "death benefits . . . were marital property subject to distribution upon dissolution, noting that retirement benefits have long been presumed to be marital property to the extent that the beneficial interest was acquired during the marriage."²¹⁵ The benefit in this case differs from those in *Smithberg*. In this case, the statute awarding the pension restricted receipt of the benefit only to a "surviving spouse."²¹⁶ "Accordingly, the survivor benefits did not belong to either of the ex-spouses, but to a hypothetical and undetermined 'surviving spouse.'"²¹⁷ The court found that, "While it is true pension benefits are generally "presumed to be marital property" under the Marriage Act, the presumption is overcome in this case where the pension benefits as issue did not belong to either spouse during the marriage." Accordingly, the court found that the trial court properly denied the petition to distribute the survivor benefit as marital property.²¹⁸

M. Lump-Sum Worker's Compensation Settlement Was Income for Child Support Purposes

The Illinois Supreme Court ruled that a trial court was correct to set child support at twenty-percent of the lump-sum workmen's compensation settlement that was intended by its terms as a lifetime disability award.²¹⁹ The court overruled *In re Marriage of Wolfe*.²²⁰ The Illinois Supreme Court said that a one-time lump-sum worker's compensation settlement was

213. *In re Marriage of Winter*, 2013 IL App (1st) 112836.

214. *Id.* at ¶ 32.

215. *Id.* at ¶ 13 (citing *Smithberg v. Illinois Municipal Retirement Fund*, 192 Ill.2d 291, at 303, 735 N.E. 2d 560 (2000)).

216. *Id.* at ¶ 16.

217. *Id.*

218. *Id.* at ¶ 17.

219. *Mayfield v. Mayfield*, 2013 IL 114655.

220. *In re Marriage of Wolfe*, 298 Ill. App.3d 510, 699 N.E. 2d 190 (1998) (holding that a trial court, without stating why it deviated from the guidelines, erred when awarding 20% of a worker's compensation which compensated the father for the remainder of his work life—arguably 25 years, well past the time when his daughter would reach majority. The Supreme Court said this case was wrongly decided).

income.²²¹ The Court found that the petitioner presented insufficient evidence to warrant a deviation under section 505(a)(2).²²²

N. Withdrawal of Savings not Considered Income—*In re Marriage of McGrath*

The Illinois Supreme Court, in *In re Marriage of McGrath*, the Court ruled that a father's regular withdrawals from his savings account in order to support himself did not constitute "net income" for purposes of calculated child support.²²³ The Court said, "Money that a person withdraws from a savings account simply does not fit into any of these definitions."²²⁴ "The money is not coming in as an increment or addition, and the account owner is not 'receiving' the money because it already belongs to him."²²⁵ The Court noted that the trial court could adjust application of the guidelines if application of the guidelines generates an amount that seems inappropriate while taking into account the financial resources and needs of the non-custodial parent.²²⁶

O. Attorney's Fees 750 ILCS 5/508(a) and Rehabilitative Maintenance v. Permanent Maintenance

In re Marriage of Bolte, gives an example of circumstances when an appellate court will reverse a circuit court's determination of contribution of attorney's fees.²²⁷ Here, the trial court had found that the ex-wife's claim for increased maintenance was "nonmeritorious," believing that the parties' agreement provided for rehabilitative maintenance and barred any other form of maintenance.²²⁸ Upon review, the Appellate Court determined that a "rational and probable interpretation of the agreement between the parties was one for a permanent maintenance award."²²⁹ The court reversed and remanded the case to the trial court for a review of maintenance and also reversed and to redetermine an award of attorney's fees stating, "[a] trial court abuses its discretion in not awarding attorney fees under section 508(a) of the Act when the evidence reveals a great disparity in the parties'

221. *Mayfield v. Mayfield*, 2013 IL 114655, ¶¶ 24-25.

222. *Id.* at ¶ 26.

223. *In re Marriage of McGrath*, 2012 IL 112792.

224. *Id.* (citing BLACK'S LAW DICTIONARY, 778 (8th ed. 2004), WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1143 (1986); *In re Marriage of Rogers*, 213 Ill.2d 129, 156-137, 820 N.E.2d 386 (2004)).

225. *McGrath*, 2012 IL 112792, ¶ 15.

226. *Id.* at ¶ 16.

227. *In re Marriage of Bolte*, 2012 IL App (3d) 110791.

228. *Id.* at ¶ 26.

229. *Id.*

actual earnings and earning capacity.”²³⁰ “A thorough review of the record makes clear that Sue has proven she lacks the ability to pay, and conversely, Terry is more than able. Sue is not required to show destitution in order for the trial court to award her attorney fees.”²³¹ Here, the trial court had only ordered the ex-husband to pay half of the ex-wife’s attorney’s fees.²³²

P. Attorney’s Fees in Indirect Civil Contempt Case Even When Attorney Did not Bill Client

In *In re Marriage of Putzler*, the court said that if a court determines that a party’s failure to comply with an order was without compelling cause or justification, attorney’s fees for the opposing party must be imposed.²³³ “Although in its written order the court did not state that the failure to comply with the court orders was ‘without compelling cause or justification,’ such findings are implied by the contempt findings.”²³⁴ Further, fees under section 508(b) may be imposed as merely a sanction is supported by the fact that a trial court must impose fees without consideration of either party’s ability to pay.²³⁵ “Instead, the court considers only the reasonableness of the fee award, based on factors such as time spent, the ability of the attorney, and the complexity of the work.”²³⁶ The court found that even though the attorney had not billed his client, the court was not precluded from imposing, as a section 508(b) sanction, reasonable attorney fees representing the time counsel spent pursuing enforcement of the court’s orders.²³⁷

Q. Vacating Marriage Dissolution Judgment Where Marital Settlement Agreement was Unconscionable and Based upon Fraud Section 2-1401

In re Marriage of Callahan,²³⁸ the respondent in a dissolution of marriage that had been entered two years earlier petitioned the court, under section 2-1401, to set aside a judgment of dissolution of marriage claiming

230. *Id.* at ¶ 33 (citing *In re Marriage of Carpel*, 232 Ill.App. 3d 806, 832, 597 N.E. 2d 847 (1992); *In re Marriage of Gable*, 205 Ill.App. 3d 696, 700, 563 N.E.2d 1215 (1990)).

231. *Id.* at ¶ 33.

232. *Id.* at ¶ 9.

233. *In re Marriage of Putzler*, 2013 IL App (2d) 120551 ¶¶ 37, 40.

234. *Id.* at ¶ 38.

235. *Id.* at ¶ 40.

236. *Id.*

237. *Id.* at ¶ 41 (citing *In re Marriage of Brockett*, 130 Ill. App. 3d 499, 501, 474 N. E. 2d 754 (1984) (determining that awarding attorney fees under section 508(a) of the Act was not precluded by the fact that petitioner was represented by a legal aid agency and was not, therefore, obligated to pay her attorney)).

238. *In re Marriage of Callahan*, 2013 IL App (1st) 113751.

that the marriage settlement agreement was unconscionable and procured by fraud.²³⁹ The trial court granted her motion for summary judgment.²⁴⁰ The ex-husband challenged this finding claiming that ex-wife had not acted diligently in challenging the judgment of dissolution. The motion for summary judgment alleged that the husband misrepresented the value of the house, ownership of the house, and the value of his pension fund.²⁴¹ The husband did not challenge these facts.²⁴² The appellate court found, “that regardless of whether respondent acted with diligence, the court properly granted her motion for summary judgment on her petition to vacate the settlement agreement incorporated into the judgment of dissolution of marriage.”²⁴³

R. Guardianship—Subject Matter Jurisdiction

The appellate court in *In re A.M., A.M., and A.M.*,²⁴⁴ makes it clear that there must first be a hearing to determine whether a parent is willing and able to make and carry out day-to-day child care decisions concerning a minor child before a hearing on the best interest of the child in a guardianship proceeding.²⁴⁵ The court references the Illinois Supreme Court’s decision *In re R.L.S.*,²⁴⁶ which acknowledges that, “[n]either the legislature nor the supreme court has equivocated on the issue of when a trial court has jurisdiction to hear a guardianship case under the Probate Act: after, and only after, the court determines that the parent is unfit to care for the child(ren).”²⁴⁷

The Illinois Third District Appellate Court also addressed the issue of standing in guardianship cases over minor children in *In re Estate of H. B.*²⁴⁸ This court discusses that there are two times under the Probate Act, which allow a court to appoint a non-parent as a guardian over a minor

239. *Id.* at ¶ 8.

240. *Id.* at ¶ 14.

241. *Id.* at ¶¶ 8, 11.

242. *Id.* at ¶ 12.

243. *Id.* at ¶ 26.

244. *In re A.M., A.M. and A.M.*, 2013 IL App (3d) 120809.

245. Section 11-5(b) of the Probate Act provides:

The court lacks jurisdiction to proceed on a petition for the appointment of a guardian of a minor if it finds that (i) the minor has a living parent, adoptive parent or adjudicated parent, whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor. . . . There shall be a rebuttable presumption that a parent of a minor is willing and able to make and carry out day-to-day child care decisions concerning the minor, but the presumption may be rebutted by a preponderance of the evidence. *A.M., A.M., and A.M.*, 2013 IL App (3d) 120809 (citing 755 ILL. COMP. STAT. 5/11-5(b) (West 2010)).

246. *In re R.L.S.*, 218 Ill.2d at 448, 844 N.E. 2d 22.

247. *A.M., A.M., and A.M.*, 2013 IL App (3d) 120809, ¶ 36.

248. *In re Estate of H. B.*, 2012 IL App (3d) 120475.

child.²⁴⁹ The first occurs when the parent has designated in writing, a guardian, successor guardian, stand-by guardian, or a short-term guardian of a minor.²⁵⁰ The second occurs where a custodial parent is living and has not completed a written designation of guardianship, which complies with the Probate Act, and a court finds that the biological parent or parents are not willing and able to make and carry out the day-to-day child care decisions for their child.²⁵¹

The Illinois First District Appellate Court in *In re Guardianship of Tatyanna* discusses yet another time when a non-parent would have standing to petition for guardianship over a minor child.²⁵² This case discusses the legislature's amendment to 755 ILCS 5/11-5(b) effective in 2011.²⁵³ This paragraph now allows standing when the parent has voluntarily relinquished custody of the child,²⁵⁴ even if the biological parent is otherwise able to care for the child.²⁵⁵ In this case, the court refused to retroactively apply the amendment.²⁵⁶

S. Equitable Adoption—*DeHart v. DeHart*

In a case of first impression, the Illinois Supreme Court addressed the concept of equitable adoption.²⁵⁷ The court discusses how many states approach the concept of equitable adoption.²⁵⁸ In some states, “the most important prerequisite to equitable adoption is proof that a contract of adoption was entered between the foster parents and the natural parents or

249. *Id.* at ¶¶ 33-34.

250. *Id.* at ¶ 33 (citing 755 ILL. COMP. STAT. 5/11-5(a-1), 11-5.3, 11-5.4 (West 2010)). “The Probate Act provides stringent requirements for this written designation, which must be witnessed by two credible witnesses over the age of 18 and must be approved by the other nonappointing parent, if also willing and able to make and carry out day-to-day decisions regarding child care.” *Id.*

251. *Id.* at ¶ 34.

252. *In re Guardianship of Tatyanna T.*, 2012 IL App (1st) 112957.

253. *Id.* at ¶¶ 20-22.

254. 755 ILL. COMP. STAT. 5/11-5(b)(1) which provides:

The court lacks jurisdiction to proceed on a petition for the appointment of a guardian of a minor if it finds that the (i) the minor has a living parent, adoptive parent or adjudicated parent, whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to carry out day-to-day child care decisions concerning the minor, unless (1) the parent or parents have voluntarily relinquished physical custody of the minor; (2) after receiving notice of the hearing under Section 11-10.1, the parent or parents fail to object to the appointment at the hearing on the petition; or (3) the parent or parents consent to the appointment as evidenced by a written document that has been notarized and dated, or by a personal appearance and consent in open court; or (ii) there is a guardian for the minor appointed by a court of competent jurisdiction. There shall be a rebuttable presumption that a parent of a minor is willing and able to carry out day-to-day child care decisions concerning the minor, but the presumption may be rebutted by a preponderance of the evidence.

255. *Id.* at ¶ 25.

256. *Id.*

257. *DeHart v. DeHart*, 2013 IL 114137.

258. *Id.* at ¶¶ 51-54.

someone standing *in loco parentis*.”²⁵⁹ “These jurisdictions apply estoppel or quasi-contract considerations where there has been clear and convincing proof of a contract, expressed or implied reliance upon the parent-child relationship, and performance of obligations under the *de facto* relationship.”²⁶⁰ “This makes so-called equitable adoption . . . essentially indiscernible from the Illinois cases involving a failure to follow the statute for adoption that have proceeded on a contract theory.”²⁶¹ Other states do not require that an expressed or implied contract to adopt exist before finding an equitable adoption has occurred.²⁶² For example, the West Virginia Supreme Court held that, “if a claimant can, by clear, cogent and convincing evidence, prove sufficient facts to convince the trier of fact that his status is identical to that of a formally adopted child, except only for the absence of a formal order of adoption, a finding of an equitable adoption is proper without proof of an adoption contract.”²⁶³ The Supreme Court concluded that equitable adoptions should be recognized in Illinois even in the absence of a statutory adoption or a contract for adoption, and as a result, adopted the California Supreme Court’s holding in *Estate of Ford v. Ford*.²⁶⁴ The Illinois Supreme Court said, “only in cases where there is sufficient, objective evidence of an intent to adopt (or fraudulently or mistakenly holding out as a natural child on a continual basis), supported by a close enduring familial relationship, will an equitable adoption be recognized.”²⁶⁵ The court found,

259. *Id.* at ¶ 52.

260. *Id.* (citing *In re Estate of Edwards*, 106 Ill.App. 3d 635,637, 435 N.E.2d 1379 (1982)).

261. *Id.* at ¶ 52.

262. *Id.* at ¶ 53.

263. *Id.* at ¶ 53 (citing *Wheeling Dollar Savings & Trust Co. v. Singer*, 162 W. Va. 502, 250 S.E.2d 369, 374 (1978)).

264. *Id.* at ¶ 58. See *Estate of Ford v. Ford*, 32 Cal.4th 160, 8 Cal.Rptr.3d 541, 82 P. 3d 747 (2004). In *Ford* the court held:

[T]o prove an equitable adoption, a claimant must demonstrate the existence of some direct expression, on the decedent’s part, of an intent to adopt the claimant. . . . [This] intent may be shown by an unperformed agreement or promise to adopt, but . . . it also may be shown by “proof of other acts or statements directly showing that the decedent intended the child to be, or to be treated as, a legally adopted child, such as an invalid or unconsummated attempt to adopt, the decedent’s statement of his or her intent to adopt, the child, or the decedent’s representation to the claimant or to the community at large that the claimant was the decedent’s natural or legally adopted child. . . . [Along with a statement or act by the decedent evincing an unequivocal intent to adopt, the claimant must show the decedent acted consistently with that intent by forming with the claimant a close and enduring familial relationship. [T]here must be objective conduct indicating mutual recognition of a parent-child relationship to such an extent that in equity and good conscience an adoption should be deemed to have taken place. . . . The *Ford* court cautioned, however, that it would not recognize estoppel arising merely from a familial relationship between the decedent and the claimant without a direct expression by the decedent of an intent to adopt the child or to have him treated as a legally adopted child. 8 Cal.Rptr.3d 541, 82 P. 3d at 753.

265. *DeHart*, 2013 IL 114137, ¶ 62.

[A] plaintiff must prove an equitable adoption claim to recover against an estate by clear and convincing evidence. Moreover, the decedent's intent to adopt and form a close and enduring familial relationship must be clear and conclusive. And it must not be just as readily harmonizable with the mere intention to provide a good home, but must instead indicate a clear intent to adopt or to continuously represent to the plaintiff and the world at large that the plaintiff was the decedent's natural child.²⁶⁶

The Supreme Court remanded the case to the trial court finding that the plaintiff had alleged sufficient facts to avoid a section 2-615 dismissal of his complaint for equitable adoption.²⁶⁷

IV. CONCLUSION

During the past three years, there were several Illinois Supreme Court cases addressing family law issues and there were also many statutory changes. It is the hope of the author that the summaries contained herein will assist the reader in seeing the broad scope of the changes in family law that occurred during the scope of this article.

266. *Id.* at ¶ 65.

267. *Id.* at ¶ 66.

